No. 82-1461

In the Supreme Court of the United States

OCTOBER TERM, 1982

LARRY D. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the entry by law enforcement officers into a motel room petitioner shared with a co-defendant, in the course of arresting the co-defendant, violated petitioner's Fourth Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A26) is reported at 696 F.2d 479. The opinion of the district court (Pet. App. A42-A45) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on December 14, 1982. A petition for rehearing was denied on January 21, 1983 (Pet. App. A1). The petition for a writ of certiorari was filed on March 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner and co-defendant Douglas Nisbet were convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21

U.S.C. 846 (Count I) and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count II).[1] Petitioner was sentenced to concurrent terms of two years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. A3-A26).

1. Prior to trial, petitioner and co-defendant Nisbet moved to suppress evidence seized by law enforcement officers from a motel room that petitioner and Nisbet had occupied (Pet. App. A28-A30). The evidence at the suppression hearing showed that on July 24, 1981, DEA Agent James McGivney learned from Illinois State Agent Frank Waldrup about outstanding Illinois arrest warrants charging co-defendant Nisbet with failure to appear in connection with narcotics violations and with fleeing and attempting to elude the state police (Tr. 6, 10-13; Pet. App. A36, A39-A40).[2] Agent McGivney also learned that an informant had advised Agent Waldrup that Nisbet would be in the area of Crawfordsville, Indiana, between July 26 and July 28, carrying a large quantity of cocaine (Tr. 38-39, 45, 47, 87; Pet. App. A36). On the following day, Agent Waldrup gave Agent McGivney a two-year-old photograph of Nisbet and copies of the unexecuted warrants, the existence of which Agent McGivney confirmed through the National Crime Index Computer System (Tr. 12-14).

On July 27, 1981, Agents McGivney and Waldrup met with Illinois and Indiana law enforcement officers in Crawfordsville to plan Nisbet's arrest (Tr. 14-16). At approximately the same time, DEA Agents King and Casey went to a Holiday Inn at Crawfordsville (Tr. 16-18). There, at about noon, they saw a man fitting Nisbet's description near the

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[1]Co-defendant Nisbet was also convicted of assaulting federal officers, in violation of 18 U.S.C. 111 (Count III).

[2]"Tr." refers to the transcript of the suppression hearing.

swimming pool (Tr. 84). Agents McGivney and Waldrup subsequently arrived at the motel (Tr. 16-18). McGivney learned through motel registration records that Room 150 was registered to "L. Jones" for two persons. At about 1:15 p.m., the man fitting Nisbet's description went to Room 150 (Tr. 20). At 1:30 p.m., Agent McGivney, with the motel manager's consent, sent Agent King dressed as a busboy to Room 150 to deliver a large quantity of food that had been ordered (Tr. 21-22, 85). After the delivery, King reported that he saw two men, one matching Nisbet's description, inside the room. He also reported seeing drug paraphernalia (Tr. 22, 86-87).

At approximately 3:30 p.m., Agent King returned to the room as a busboy to attempt to retrieve the food tray (Tr. 63-64, 94). King was not given the tray, but was able for the first time positively to identify one of the men as Nisbet (Tr. 64, 101).

At 5:30 p.m., the arrest team followed Agent King to Nisbet's room (Tr. 23, 87-88). Agent King knocked on the door and stated that he had come to pick up the food tray because he was going off duty (Tr. 23-24, 88). When Nisbet opened the door with the tray in hand, Agent King announced: "Police. You are under arrest" (Tr. 24, 88-89). Nisbet responded by throwing the articles on the tray at Agent King. By this time, Agent McGivney was at Agent King's side. Nisbet proceeded to swing the tray at both agents. Agent McGivney blocked the tray with his shotgun, causing the gun to discharge (Tr. 24, 91-92). Nisbet and petitioner, the other occupant in the room, fell to the floor wounded (Tr. 25, 35, 69-70, 92). The agents then entered the room, arrested Nisbet and petitioner and removed them to the lawn outside the room (Tr. 6, 25-26, 70).

While the two men were being handcuffed, Agent McGivney conducted a protective sweep of the room (Tr. 26). At that time he discovered in plain view two plastic bags

containing green vegetable matter believed to be marijuana, white powder on the top of the television, and an open suitcase containing zip-lock bags of white powder, cutting agents and packaging materials (Tr. 7, 72-73). The room was secured while Agent McGivney obtained a search warrant (Tr. 8-9, 31). The subsequent search revealed several packets of cocaine and drug paraphernalia (Tr. 7-9).

2. In denying petitioner's motion to suppress, the district court concluded that the entry into the room was "necessitated by Nisbet's improperly resisting a valid arrest" (Pet. App. A44). The court further concluded that Agent McGivney "was entitled to make a protective sweep of the premises" once he was drawn into the room to subdue Nisbet and complete the arrest (*ibid.*).

The court of appeals affirmed (Pet. App. A3-A26). The court held that the arresting agents had probable cause to arrest both petitioner and co-defendant Nisbet (*id.* at A8-A11), and that the entry into the motel room satisfied the requirements of the Fourth Amendment, as interpreted by this Court in *Payton* v. *New York*, 445 U.S. 573 (1980), because the agents relied upon the outstanding arrest warrants for co-defendant Nisbet (Pet. App. A11-A12). In addition, the court of appeals expressed agreement with the district court that the entry also was justified by exigent circumstances (*id.* at A12 n.7):

> The sequence of events surrounding the arrest also indicates that [petitioner's] and Nisbet's right to be free from unreasonable searches was not violated. Agent King knocked on the door of room 150 and announced that he was a bus boy. When Nisbet opened the door, King displayed his badge and announced that Nisbet was under arrest. The agents did not enter the room until Nisbet began struggling with them. During the struggle, Nisbet fell back into the room where he was

> subdued. Then, [petitioner] was discovered and arrested, and Agent McGivney conducted a brief "protective sweep" of the premises.

Finally, the court of appeals rejected the argument that the agents were constitutionally compelled to obtain a telephonic search warrant before conducting the protective sweep of the motel room in the course of arresting petitioner and Nisbet (*id.* at A12-A13).

ARGUMENT

1. In the course of subduing and arresting co-defendant Nisbet, federal and state law enforcement officers entered the motel room that petitioner shared with Nisbet. Both courts below correctly rejected petitioner's Fourth Amendment contentions, concluding that the entry into the motel room was justified by the exigent circumstances occasioned by Nisbet's assault upon the arresting agents.

Petitioner contends (Pet. 5-11), however, that the officers' actions violated the arrest warrant requirement established by this Court in *Payton* v. *New York*, 445 U.S. 573 (1980).[3] He first argues that the Illinois arrest warrants for Nisbet were constitutionally inadequate under *Payton* because Indiana law apparently does not authorize its police officers to execute arrest warrants that have been issued in another state. He then argues that, under *Payton*, it was improper for the officers to employ a ruse to cause Nisbet to open the door of the motel room so that they

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[3]Contrary to petitioner's suggestion (Pet. 5, 11), *Steagald* v. *United States*, 451 U.S. 204 (1981), is inapposite. In *Steagald*, this Court held that, absent consent or exigent circumstances, law enforcement officers must obtain a search warrant before they may enter a *third party's* home to arrest the subject of an arrest warrant. In the instant case, petitioner shared the motel room with Nisbet, who was the subject of the arrest warrants. Accordingly, the arrest warrant rule of *Payton* applies.

could place him under arrest on the basis of probable cause.[4]

Petitioner's arguments are without merit. Although we believe that the *Payton* arrest warrant requirement was clearly satisfied by the Illinois warrants (see page 9, *infra*), there is no need even to consider that issue because the *Payton* rule is not at all implicated by the officers' actions here.

We submit that *Payton* does not extend to the situation in which officers possessing probable cause but no warrant, by ruse or show of force, cause a suspect to open the door of his house, thereby placing himself in a position to be arrested without any entry into the premises. In our view, such a situation is governed by the principles of *United States* v. *Watson*, 423 U.S. 411 (1976), and *United States* v. *Santana*, 427 U.S. 38 (1976), upholding warrantless probable cause arrests that do not require an entry into the home, rather than by *Payton*. The gist of *Payton* is not that the home is a sanctuary against warrantless arrests, but rather that the *search* of the home resulting from an arrest entry implicates an independent interest deserving of some form of warrant protection. Accordingly, if an arrest can be effectuated without an entry into the home, the policies served by the decision in *Payton* are not implicated.

Based on the foregoing principles, we submit that the officers' use of a ruse to cause Nisbet to open the door of the motel room was permissible under the Fourth Amendment.

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[4]Petitioner does not contest the existence of probable cause to arrest Nisbet. The record shows that even apart from the outstanding Illinois arrest warrants for Nisbet, the officers were aware that a previously reliable informant had stated that Nisbet would be in Crawfordsville and would have with him a large quantity of cocaine. The informant's account was corroborated by Nisbet's presence at the motel in Crawfordsville, and by the observation of drug paraphernalia in the motel room.

Once Nisbet appeared at the door and exposed himself to public view, the agents were entitled to attempt to arrest him at the doorway. See *United States* v. *Santana, supra; United States* v. *Botero*, 589 F.2d 430 (9th Cir. 1978), cert. denied, 441 U.S. 944 (1979). As the court of appeals concluded (Pet. App. A12 n.7), "[t]he agents did not enter the room until Nisbet began struggling with them." In response to the exigent circumstances created by Nisbet's efforts to resist arrest, it was perfectly reasonable for the officers to enter the motel room to subdue Nisbet and complete the arrest.

Petitioner contends (Pet. 9-10) that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Johnson*, 626 F.2d 753 (1980), aff'd on another ground, No. 80-1608 (June 21, 1982). In *Johnson*, Secret Service agents who had probable cause but no warrant to arrest Johnson, went to Johnson's house, knocked on the door, and identified themselves by fictitious names. When Johnson opened the door, the agents, who had their guns drawn, asked Johnson whether they could talk to him. Johnson permitted the agents to enter the house and gave an incriminating statement to the agents. The court of appeals held that Johnson had been arrested as he stood in the doorway and was confronted by the agents with their guns drawn. 626 F.2d at 757. Distinguishing the doorway arrest from those in *United States* v. *Santana, supra*, and *United States* v. *Botero, supra*, because Johnson did not voluntarily expose himself to public view but rather was induced to open his door through the use of a ruse, the court concluded that it is the location of the arrested person, and not that of the arresting agents, that determines whether an arrest occurs "within" a home under *Payton*. In addition, the court expressed its belief that Johnson's invitation to the agents to enter his home was not voluntary in light of the "coercive effect" of the weapons brandished by the agents.

For the reasons discussed above, we submit that the court of appeals in *Johnson* clearly erred in ruling that *Payton* prohibits police officers from causing a suspect, by means of a ruse, to appear at the doorway of his home so that they can arrest him on probable cause without entering the premises. Moreover, we seriously doubt that the Ninth Circuit will continue to adhere to that ruling.[5] In any event, *Johnson* involved an actual entry into the suspect's home in the course of arresting him; accordingly, the court's discussion concerning the use of a ruse was not essential to its decision. Because the entry in *Johnson* was held to have been justified neither by consent nor by exigent circumstances, it is distinguishable from the instant case, in which both courts below have determined that the actual entry into the motel room was necessitated by exigent circumstances arising from Nisbet's forcible resistance to his arrest. Furthermore, unlike the defendant in *Johnson*, who was himself induced to open the door as a result of the ruse, petitioner cannot assert that his own legitimate expectations of privacy were infringed by the officers' use of deceptive means to cause co-defendant Nisbet to open the door and expose himself to the officers' view. As already noted, the agents did not actually enter the room until after Nisbet began to resist the arrest.

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[5]Indeed, in *United States* v. *Martin*, No. 81-1402 (July 1, 1982), slip op. 3-4, a panel of the Ninth Circuit upheld the use of a ruse in order to induce the defendants to exit a motel room so that they could be arrested. The court noted that the defendants' reliance on *Payton* and *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978), was unavailing "because those cases require an officer to obtain a warrant in order to enter a suspected felon's home in order to arrest the felon. Although the officers who arrested Martin and Campos had no warrant (and neither appellant contends that the officers lacked probable cause for arrest), the arrests were executed when Martin and Campos were leaving the motel room." Slip op. 4.

2. In any event, the Illinois arrest warrants were constitutionally sufficient to permit the officers to effect an arrest entry inside the motel room. In *Payton* (445 U.S. at 602-603) this Court observed that an arrest warrant requirement

> will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Petitioner does not suggest that the arrest warrants in this case were not issued by "a detached magistrate" upon a determination of probable cause. Nor does he contend that the agents lacked reason to believe that Nisbet, the subject of the warrants, was within the motel room. Rather, he contends (Pet. 5-6) that the Illinois arrest warrants could not properly be executed in Indiana. But the federal constitutional question whether a state warrant is sufficient under the Fourth Amendment to permit an officer to effect an arrest entry ought not to turn on whether the warrant complies in all respects with the particular technical requirements of state law. Here, the warrants embodied a determination by a neutral magistrate that there was probable cause to arrest Nisbet on criminal charges. This was sufficient to satisfy the warrant requirement of the Constitution.

3. Petitioner contends (Pet. 12-15) that his Fourth Amendment rights were violated because the officers entered the motel room without first obtaining a telephonic

search warrant, pursuant to Rule 41(c)(2) of the Federal Rules of Criminal Procedure. As we have already shown, however, the entry into the motel room was justified by the arrest warrants for Nisbet and by the exigent circumstances surrounding Nisbet's arrest. Although the court of appeals noted that the agents had probable cause to search the room at least two hours prior to the initial entry and that a telephonic warrant in all likelihood could have been obtained (Pet. App. A13-A14), the court nevertheless correctly concluded (*id.* at A12) that "a search warrant was [not] constitutionally compelled in this case." Petitioner's contention (Pet. 14) that "the telephonic warrant procedures are mandatory" is simply incorrect. Nothing in Rule 41(c)(2) requires government agents to obtain a telephonic warrant when a warrant is not required by the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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